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The ‘Integrative Approach’ and Labour Regulation and Indonesia: Prospects and Challenges

Abstract

In contrast to theories of regulation which bypass the state and cede regulatory authority to private regimes, the scholar Kevin Kolben makes a cogent argument for the state to be brought back to centre stage in labour regulation, but envisages that private actors can develop and strengthen its capacity. This article considers the utility of what he terms an *integrative approach* for Indonesia. In line with what the approach advocates, it examines the relationships between private actors and the state and considers the extent to which the former can communicate, interact with and incentivise the latter in ways which strengthens its regulatory capacity. Several challenges are identified. Finally, the potential of the *Better Work Program* in Indonesia to further the goals of the approach is assessed.

Introduction

The ways in which worker rights can most effectively be protected in developing countries continues to attract scholarly attention, prompting, recently, the introduction of various ‘regulation’ frameworks to regulate labour in these countries (Sabel, O’Rourke & Fung, 2000; Braithwaite, 2006; Kolben, 2011). A pressing problem in these countries, often under emphasised (e.g. Braithwaite, 2006), is that of overcoming the limited capacity of the state to regulate labour. Weak adherence to the rule of law, a lack of enforcement capacity, opposition from business in implementing labour regulations and high levels of corruption are particularly severe and contribute to regulatory failure (Graham & Woods, 2006). Many developing countries are also unwilling to regulate, anxious to offer cheap unregulated labour as they compete for foreign capital (Mayer & Gereffi, 2010). This unwillingness is further encouraged by the continual emphasis on deregulation by international organisations such as the IMF, WTO and the World Bank. In response to the inability and unwillingness of these states to regulate labour, scholarly discussion has shifted, in the last twenty years, to questioning the potential of ‘soft’ law and non-mandatory measures to safeguard workers’ rights; e.g. compliance with Codes of Conduct, certification of firms observing international ‘ethical’ auditing standards, compliance with international disclosure requirements and promoting Corporate Social Responsibility.

An ‘Integrative Approach’ to Labour Regulation

In a recent article (2011),¹ Kolben notes the emergence of transnational private regulatory regimes (*TPLR*) in developing countries which seek to substitute or supplement what the state, by virtue of its institutional and structural deficiencies, cannot provide.² Various forms of private regulation have replaced what has been the traditional regulatory role of the state. But these kinds of private regulation are subject to various criticisms and may be insufficient, even destructive, responses to deficiencies in national labour law enforcement. Unlike public law and enforcement mechanisms in democratic societies, they are unresponsive to political and democratic processes and pressures (*TPLR* is a top-down, managerialist and privatised form of governance in which the regulated subjects, i.e., workers, have little input into its content or application), are far less stable (because it is dependent on consumer preferences and the actions of civil society) and the quality of various systems is highly variable and does not necessarily prioritise the protection of core labour standards (pp. 408, 409). Kolben also notes that the emergence of *TPLR* has coincided with the rise of several governance theories of regulation which move away from relying on the state as regulator. They have been applied to labour regulation and development and global supply chains. Kolben casts doubts on the helpfulness of these theories on the basis that they investigate and discuss regulatory phenomena that take place in the context of *developed* countries (and so, are unsuitable for regulation in *developing* countries), cede regulation to private regulatory regimes, leapfrog over dysfunctional states and are agnostic about the traditional goals and values of labour law (pp. 427, 428). He proposes an alternative approach to labour regulation, what he terms an *integrative approach*.³ In contrast to the theories he critiques

¹ Kolben, K. (2011) “Transnational Labour Regulation and the Limits of Governance”, *Theoretical Inquiries in Law*, 12, 2, Article 2

² Kolben makes several references to dysfunctional states and categorises them as those possessing eg. ‘weak state capacity’, ‘lack of respect for the rule of law’ ‘poor enforcement of the law’ ‘lack of state legitimacy’ ‘poorly functioning states’ ‘underdeveloped regulatory regimes’ (pp. 406, 415, 418, 427, 429).

³ For a discussion of a similar concept (‘*integrative linkage*’) in the context of international trade, see Kolben, K. (2007), “Integrative Linkage:

(systems theory, responsive regulation, new governance), this approach brings the state back in and places it centre stage in regulating labour. Unlike these theories, it emphasises a pivotal role for the state in labour regulation and in the development of state-led democratic governance in developing countries. It thus seeks to develop state capacity where it is lacking where there are compelling pragmatic or social justice reasons for doing so (pp.405, 432).

Kolben, in his article, sets down the parameters for an *integrative approach*. He argues that an *integrative approach* ought to be implemented on a case by case and context specific basis, to take into consideration differences in law and legal culture. It takes into account the fact that workplaces in developing countries often contain marked power imbalances. Thus, regulation which relies completely on deliberation and benchmarking at the expense of rights and citizenship ('top down' approaches such as reliance on international organisations or Codes of Conduct or law to regulate labour), are unsuitable. The approach further focuses on state capacity building and links labour regulation and other developmental goals such as democracy building and human rights (p. 433). Significantly, Kolben presses the point that private and public regulatory regimes can operate in complementary fashions. He envisages systems of communication and interaction between private and public regulatory actors with the explicit goal of developing public regulatory regimes where those regimes are weak (2011: pp. 434 – 436). Kolben envisages that interaction between state and private actors may be deliberate (where engagement between the private and public is done willingly and self-consciously as part of an intentional regulatory strategy, p. 434) as well as unintentional (where actors do not intend to, or actively desire to, engage in communication/coordination, p. 434). Both types are capable of developing state regulatory capacity.

Making a Case for the ‘Integrative Approach’

In making a case for the ‘integrative approach’, Kolben drew from three case studies. He referred to Amengual (2010) who examined labour practices of a multinational in the apparel sector in the Dominican Republic. Amengual noted how private actors (the multinational ‘ABC’) were able to increase state involvement (*Secretaria de Estado de Trabajo* or ‘SET’ labour inspectorates) in labour regulation. With different styles of regulation and varying types of competencies, state and private actors had distinct comparative advantages in identifying poor labour standards. For example, there was an increased demand for state inspection services by factories required by ‘ABC’ auditors to provide certain documents or state certificates. The state tended to focus on freedom of association issues whilst auditors concentrated on health and safety. Further, the state relied on complaints from workers and requests from management for inspections, whilst auditors concentrated on issues in Codes of Practice. In all cases, as state and private actors pursued similar goals, their different ways of tackling issues, together with their comparative advantages, widened the range of problems they could remedy, even where express coordination between them was lacking.⁴ Nonetheless, Amengual cautioned that ensuring that the comparative advantages of one regulator complement those of another in a way which would widen the sphere of regulation in the way described may not be always possible in countries with extremely weak public and private labour actors (Amengual, 2010: p. 413).

⁴ On the comparative advantages of regulators, Amengual noted the works of other scholars who studied the approach adopted by labour inspectors toward monitoring standards in the Latin American region. See Piore, M. & Shrank, A. (2008) “Toward Managed Flexibility: The Revival of Labour Inspection in the Latin World” *International Labour Review*, 147, 1, 1 – 23 who noted the pedagogic and flexible nature of the Latin model of labour regulation which focused on rehabilitation rather than deterrence, and Pires, R. (2008), “Promoting Sustainable Compliance: Styles of Labour Inspection and Compliance Outcomes in Brazil” *International Labour Review*, 147, 2-3, 199 – 229 who suggests that sustainable compliance solutions in the Brazilian workplace resulted from a combination of coercive and pedagogical enforcement strategies.

Kolben also drew from the work of Seidman (2007) who, in discussing the success of transnational labour activist networks in monitoring labour standards in Guatemala, noted that the work of the Commission for the Verification of Codes of Conduct (COVERCO) was regarded not as “an alternative to oversight by state institutions but rather as a key part of trying to strengthen and democratise them.” (p. 432). COVERCO’s strategic and philosophical commitment (aiming, through private regulation, to develop state capacity and democratic institutions) allowed it to shift the focus of attention away from MNCs toward local concerns (even conducting training for the Guatemalan labour inspectorate to improve their capacity). Thus it strengthened state capacity to intervene on behalf of vulnerable citizens at work. Kolben notes Seidman’s argument that activists should focus their efforts on shoring up weak states and reinforcing national institutions (p. 432).

Finally, Kolben referred to research conducted by Barenberg (2007) on the Workers’ Rights Consortium (WRC) in Mexico and Indonesia. Barenberg (2007) explained that a factor which enabled the WRC to improve standards in factories in Mexico and Indonesia was:

“The WRC seeks to develop an intensive model of private monitoring, but it opposes the displacement of legitimate sovereign authorities and workers’ organisations by private organisations. It therefore seeks to cooperate with and build the capacity of local labour ministries and tribunals, just as it and other private monitors attempt to build the capacity of local NGOs...”

Barenberg listed several distinctive factors which contributed to WRC’s success in securing the freedom of association in the factories investigated, not least its emphasis on continuous detailed remediation by factory managers as opposed to on-spot checks by auditors, building high trust relationships with workers and their neighbourhoods and forging deep relationships with local actors who were able to ensure that remediation efforts reached rural villages and informal workers, and who could understand and negotiate the complex political environment (Barenberg, 2007: pp. 61 – 63).

Kolben's attraction to Seidman's and Barenberg's case studies lies in their conceptualisations of private regulation as state-focused and democratic (p. 432). On Amengual, Kolben draws attention to the ways private and public enforcement regimes engaged with and impact each other on the ground (p. 430). He asserts: "What is needed, therefore, is an approach to the new private developments in global labour governance that, rather than leapfrogging over dysfunctional states as some governance theories seek to do, aims instead to develop state capacity and calls for state action in realms where private regulation lacks legitimacy, or where it is likely to fail in the longer term." (p. 433).

The *Integrative Approach* and Indonesia

If we are persuaded by the value and importance of the *integrative approach* to labour regulation for developing countries, a natural step would be to make a case for its adoption in countries notorious for poor labour standards and dysfunctional states. An example of such a country is Indonesia. Indonesia is one of the world's leading exporters of textiles and apparel products and host to many foreign multinationals. With 240 million people, it is the fourth most populous country in the world and an important economy in employment terms. Yet less than 40% of its 150 million working population are in formal employment, with the great majority working in the informal sector with inadequate legal protection. Women are treated as flexible and expendable workers. The exploitation of child labour is a serious problem. Indonesia has been the target of several international petitions criticising its failure to meet internationally recognised labour standards, although it has ratified all eight ILO core labour conventions. Labour law enforcement remains weak and inconsistent, because of a lack of resources, high levels of corruption between state and business and a desire to attract foreign capital. Its slow economic recovery since the Asian financial crisis has pushed more workers into the informal sector, reducing their protection and creating fertile conditions for child labour. The Indonesian government faces several challenges simultaneously: securing economic growth, raising living standards and improving labour conditions. Indonesia is also a prime

example of a country where private labour regulatory regimes have failed to protect workers (see discussions in the sections below). It is therefore a suitable country to test Kolben's theory. In tackling this task, this article will examine how private and public labour regulatory regimes in Indonesia engage with each other in its regulatory environment. It will also ask to what extent the former incentivises, encourages and puts pressure on the state to improve its regulatory capacity (whether deliberately or unintentionally). Finally, it analyses the potential of recent efforts by the international community to improve labour standards in Indonesia – the Better Work Program (*BWP*). Promisingly, the Program reflects elements of the *integrative approach* where employers, international buyers (MNCs), unions and the state collaborate to improve labour standards. An interesting question is the extent to which it is possible for *BWP* to contribute to developing state regulatory capacity in ways envisaged under the approach.

Indonesian Employment Relations

We take, as a starting point, employment relations in Indonesia post-Soeharto (1967 – 1998), as this period signified the start of democracy and new opportunities for workers to organise. Under Soeharto, unions were systematically suppressed, and they had virtually no influence in the policy making processes for economic development (Hadiz, 1997; Tjandra, 2008, 2010). Although workers inherited a series of protective legislation enacted after independence in 1945, they were not implemented in practice. Acting in the name of 'economic development' and with a strong military at his disposal, Soeharto did not see any need to change the law where it could simply be ignored. Until the end of his dictatorship, the *SPSI* (*Serikat Pekerja Seluruh Indonesia, or All Indonesia Workers Union*) was the only union allowed to operate throughout Indonesia and its leaders were generally picked by Soeharto himself. Its role was to assist with controlling the workers in line with his labour policies and was known for its pro-management stance.

Post-Soeharto, the Habibie government (1998 – 1999) introduced laws which favoured trade unions and workers' participation, in part, to change the authoritarian image of the Soeharto era. Since the reform and relaxation of union formation regulations in 1998, unions have grown phenomenally: from only one in early 1998 to 100 national federations in late 2009, including four national confederations, and thousands of non-nationally registered plant level unions. Indonesia was also the first country in Asia Pacific to ratify all core conventions of the ILO, including Conventions No. 87 and 98 on the rights to associate and collective bargaining. Many imprisoned labour activists were released and several former trade unionists were appointed as government ministers. These appointments are symptomatic of a major shift in government policy towards greater support of labour rights and standards (Rupidara & McGraw, 2010).

Yet workers have not benefitted in the way they had expected. The 1997 financial crisis brought down the Soeharto regime, but it also paved the way for economic liberalisation. As with many other developing countries, Indonesia had spiralled into an economic crisis in 1997-98, and it was forced to concede to the neo-liberal prescriptions of the IMF in exchange for a \$43 billion bailout loan. Alongside laws enacted to protect workers after 1998, were those which also promoted labour market flexibility (legitimisation of outsourcing practices, non-permanent contracts, mass redundancies, reduced severance pay). The use of private employment agencies to recruit workers allowed employers to by-pass their legal obligations to these workers. They also led to the creation of more non-permanent jobs (in an economy with an already huge labour surplus). Despite unions having greater freedom to organise, many firms refused their involvement in the workplace. With numbers of regular workers diminishing, unionism declined. Significantly, there are benefits to be gained from low level regulation of labour, especially if countries are competing for foreign capital. Graham & Woods (2006) note that developing countries have limited capacity to regulate labour, but that equally, many lack the political will to regulate, hoping to attract investors favouring countries with weak regulatory systems (pp.868, 869). In this

regard, Indonesia is no exception. Poor enforcement of labour laws, high levels of corruption, close relationships between business and government and an unwillingness of the state to regulate labour all exacerbated the position of workers (Feridhanusetyawan & Pangestu, 2003; Kristiansen & Lambang, 2005; Tjandraningsih & Nugroho, 2008, Suryomenggolo, 2009; Juliawan, 2010; Rupidara & McGraw, 2010).

It is against this background of weak state structures and institutions, pursuit of economic growth at the expense of labour *rights* and weak bargaining power on the part of workers that Indonesian labour relations must be understood. It is also within this context that the prospects and challenges of moving toward an *integrative approach* to labour regulation need to be discussed.

Private Actors developing State Regulatory Capacity in Indonesia

Can private actors in Indonesia serve a more dynamic role than they do currently and build state regulatory capacity? Kolben was explicit about private actors doing this by willingly and self consciously engaging with the state to develop its capacity, but that the same results could be achieved even where no such deliberate engagement existed, where communication and coordination between the private and public was unintentional and informal (as in the Amengual case study). The following sections consider the ways in which three private actors, namely, unions, NGOs and MNCs engage with the state in the regulation of labour and evaluate their potential to identify, target and remedy deficiencies in state regulatory capacity.

I) Unions

Unions can encourage and motivate the state to expand its regulatory capacity in the realm of labour in several ways. They can, for example, promote a culture in which the regulation of labour is expected in the workplace, thus putting pressure on the state to intervene. Because of their continuous presence in the workplace, they can complement the monitoring activities of labour inspectors by presenting to the latter information about labour violations which are not easy to detect (temperatures in factories at

certain times of the day might fall below what is required under the law, use of child labour during specific seasons, mistreatment of casual and irregular workers who do not work on site). They can also join forces with their affiliates to, collectively, lobby against the state to reform and enforce labour laws to benefit workers.

Some observations on the potential of unions to work in ways which can develop or strengthen state regulatory capacity may be made. Unions in Indonesia are generally under-developed, lack political influence and suffer from low levels of competence. It was noted above that, in theory, unions were, after the Soeharto regime, better placed to represent workers and that many independent unions were formed in the post-Soeharto era. In reality, however, unions have not been able to capitalise on the new opportunities. Many were in the earliest stages of organising and had not developed strategies for defending workers' interests. They were thrust into a situation where they had to respond to labour law reform programs with little experience, few resources and even less political power. Suryomenggolo (2009) noted that in the labour law reform process post-Soeharto, unions in fact received little information about the process and were not consulted. Their lack of political power meant that they could not fully articulate and promote their interests at the outset, and worse still, laws were consequently passed which imposed greater constraints on their future responses and strategies (pp. 2, 10).⁵ Tornquist's (2004) account of the democratisation process in Indonesia also revealed the marginal role of labour, emphasising its lack of capacity and influence. Changes in politics were influenced by middle class politicians and intellectuals, neither of whom drew on the labour movement for support. Ford (2006c) suggests that prospects for effective trade unionism post-Soeharto have been limited by external constraints on unions and weaknesses in their internal structures. Although Indonesia's employment relations climate appears

⁵ See also Uwiyono, A. (2007), "Indonesian Labour Reform Since 1998", in Naoyuki Sakumoto and Hikmahanto Juwana (Eds), *Reforming Laws and Institutions in Indonesia: An Assessment*, (IDE-JETRO, Faculty of Law University of Indonesia Press, Jakarta), pp. 187 – 203.

more conducive to trade unionism, ongoing economic difficulties mean that unions have little strategic bargaining power either nationally or on the shop floor. Other factors, such as knowledge differentials between union leaders and members, the lack of ability on the part of workers to communicate effectively and participate in union activities also contributed to weak trade unionism. The generally low organisational capacity of unions, coupled with high unemployment and a chronic labour surplus have eroded their role in labour relations. Finally, although the numbers of unions have increased greatly, they have also shown a strong tendency to become embroiled in infighting, and are marked more by fragmentation and division than effective cooperation. Consequently, it is unsurprising that they have not been able to mitigate the effects of large scale liberalisation of labour laws which legitimised exploitative labour practices (Heryanto & Hadiz, 2005; Rupidara & McGraw, 2010; Juliawan, 2010). In sum, it is arguable that their weak and fragmented state, lack of political influence and generally low levels of competence pose great challenges for unions to strengthen state regulation, or incentivise or put pressure on it to improve its regulatory capacity.

II) NGOs

Labour standards monitoring by NGOs are expanding rapidly in developing countries (O'Rourke, 2003; Wells, 2007). NGOs help workers in a variety of ways, from monitoring firm compliance with Codes, to representing workers in disputes against employers, meeting their welfare and recreational needs and helping them form unions. To what extent are NGOs, as private actors, also able to develop and strengthen state regulatory capacity in the realm of labour? For example, can they advocate improved democratic governance in the workplace in ways which cause the state to respond favourably to the right to freedom of association and collective bargaining? Can their competencies complement those of the state to train labour inspectors to detect a wider range of labour violations? In the realm of politics, can their representatives conduct formal meetings with the state to coordinate their mechanisms to regulate labour?

Empirical research however, also reveals that NGOs are limited by various internal weaknesses (O'Rourke, 2003; Ebenshade, 2004; Wells, 2006; Wells, 2007), all of which impact negatively on their ability to develop or expand state regulatory capacity. Their potential to do so is further limited by disagreements between themselves and other private actors (Frundt, 2004). Last but not least, many NGOs capitalise on the language of *human rights* to improve working conditions for labour, a strategy which might not be entirely appropriate. Human rights and labour rights are different both as *concepts* and as *movements*. While *human rights* seek to limit the power of the state, *labour rights* aim to limit the power of private actors in the market. While *human rights* revolve around individuals and seek to achieve outcomes such as better working conditions, *labour rights* are more collectively orientated, with worker mobilisation and negotiations processes taking precedence. The language of *human rights* does not necessarily examine and question fundamental economic relationships in society, nor is it committed to direct action as a method, or workplace democracy as a goal, to the same extent as the labour movement (Kolben, 2010).

O'Rourke (2003) notes that the ability of firms to move production quickly among factories and hide behind multiple layers of ownership makes systematic inspections of compliance with Codes by NGOs a difficult task (p. 23). NGOs are also liable to miss many of the largest issues faced by workers because they do not have continuous workplace presence. Moreover, as NGOs typically focus on workers in first-tier suppliers and large factories, they rarely reach down to informal-sector workers. Even worse, monitoring by NGOs crowds out the efforts of workers' organisations (p. 22)⁶ and in many instances, where results are damning, firms have ended contracts with poor performing factories, leading to job

⁶ O'Rourke draws from literature which shows how NGOs supplant unions' roles as worker advocates by discussing wages and working conditions with factories – a process which helps powerful companies avoid union organising, collective agreements and government regulation.

losses.⁷ In analysing NGO monitoring of firm compliance with Codes in supplier factors in the ‘global south’, Wells (2007) noted that NGOs, *inter alia*, lacked autonomy, provided incomplete and inaccurate reports, did not focus on core labour standards, were unable to provide remedies which remained at the discretion of firms and were helpless when firms relocated to avoid monitoring. He opined that an NGO-centred, ‘soft law’ policy approach to labour regulation was simply ‘too weak for the job’ (pp. 51, 65). Similarly, in the flower export industries in Columbia and Ecuador, Korovkin & Sanmiguel Valderrama (2007) noted that although firms and NGOs had the same goals, conflict arose because both wanted monitoring processes to be carried out in line with their own preferences. Firms avoided the issue of worker organisation and concentrated on less controversial aspects of labour standards. NGOs, on the other hand, regarded the existence of independent trade unions as a prerequisite for ensuring compliance with labour norms. At times, relationships between labour NGOs and unions have become so riddled with complications that NGOs have been dissolved (Frundt, 2004).

NGOs have enjoyed a long presence in labour regulation in Indonesia, primarily because of the repression of trade union activities, but also because of the significant portion of unorganised and unorganisable workers (Hadiz, 2001; Nyman, 2006: 103 – 104). Soeharto initially welcomed the interventions of NGOs in society, because they were committed to community development projects and could reach the poorest segments of society. In the 1980s however, their activities were severely curtailed in the name of ‘de-ideologisation’ and ‘depoliticisation’. Soeharto promoted the *Pancasila* ideology (Soeharto’s version emphasised harmonious and cooperative relationships between labour and employer) and no organisation was allowed to pursue alternative ones. As a result, many NGOs lacked their own ideologies which would have been useful in

⁷ See also O’Rourke, D. (2002), “Monitoring the Monitors: A Critique of Corporate Third Party Labour Monitoring” in R. Jenkins, R. Pearson, & G. Seyfang (Eds.), *Corporate Responsibility and Labour Rights: Codes of Conduct in the Global Economy*, (London: Earthscan), pp. 196 – 208

directing their movements. They also had to adjust to the Soeharto era by keeping a low profile for fear of being banned or dissolved.

The post-Soeharto era brought new opportunities to NGO to participate in politics and society (Hadiz, 2001; Ford, 2003, 2006a, 2006b; Nyman, 2006; Rupidara & McGraw, 2010). In the workplace, Ford noted that labour NGOs fulfilled a range of functions which lay both outside and within the traditional ambit of unions. These included activities associated with grassroots labour organising (education, establishing community workers' groups, providing legal services, encouraging strike actions) as well as research and policy advocacy (documenting the living and working conditions of factory labour, lobbying government and firms to increase the minimum wage, improving health and safety, campaigning for changes to labour legislation). Further, many NGOs built networks with each other, with unions and with international organisations to advance worker rights. She contended that so crucial are NGOs to the improvement of labour standards that they should be regarded as a movement in their own right (Ford, 2006a; Ford, 2009).⁸

Nonetheless, the fact remains that Indonesia is a relatively young democracy, with weak administrative and governance structures. Whilst the number of NGOs has grown significantly post-Soeharto, many still struggle to engage with government, the business community and other stakeholders, diminishing their influence on the state in the regulation of labour. Hadiz (2001) noted that relations between NGOs and unions tend to be one of proliferation rather than consolidation. Unions also sought to

⁸ However, Ford (2009) also shows there were several problems which limited the effectiveness of NGOs to improve labour standards, not least their uneasy relationship with unions. Many NGOs regarded themselves as outsiders who were only a partial and temporary substitute for 'true' unions organised by workers. As unions grew in significant numbers post-Soeharto, many labour NGOs responded by pulling back from their once dominant position in the labour movement. An "extremely complicated" relationship between unions and NGOs emerged "as a result of different expectations of the terms of NGO involvement and the extent of their commitment to the labour movement" (p. 133).

limit the role of NGOs in their activities, in order to encourage rank and file leadership to emerge (p. 122). Such tendencies restrict NGOs and unions from successfully collaborating together to lobby the state to improve labour standards. In addition, the leader-follower structure of many NGOs, and the unwillingness of many leaders to address issues of succession, has not prepared NGOs for capacity development. In a recent study of attempts of NGOs to improve labour standards for women workers, for example, Yazid (2008) noted that their collaborations and networks with each other and with the state were hampered by rivalries, different perceptions on how to interact with the government, unwillingness to share information and intense competition for funding. Weak coordination and different approaches to the same problems caused networks to become stagnant and weak. As a result, many of their activities did not progress beyond mere information sharing, conducting joint research and issuing press statements. Finally, the lack of an umbrella organisation for NGOs means that there is no central body which functions as a representative in promoting the existence and the interests of NGOs to outside parties and to help with internal capacity building purposes (Antlov, Ibrahim & Tuijl, 2007; Antlov, Binkerhoff & Rapp, 2008).

Indeed, a serious problem confronting NGOs in Indonesia, limiting their potential to influence the state is their lack of capacity building (Fanany, Fanany & Kenny, 2009).⁹ Many are temporary, set up quickly in response to funding availability for a specific project, but collapsing after funding becomes unavailable. This leads to a high degree of impermanence and transfer of staff between established and newly formed NGOs. Political

⁹ The authors argue that the concept is poorly understood in Indonesia. It has been adopted into the Indonesian development vocabulary without debate or discussion of its relevance for the local context. 'Capacity building' is often thought to mean the general capacity of *individuals* within organisations, as opposed to the ability of organisations themselves. As a result, institutional processes, organisational frameworks and accountability mechanisms have been overlooked in favour of training programs for staff. Similarly, organisations have rarely undertaken capacity building which focuses on the abilities of communities to address *collective* concerns.

uncertainty and lack of funding have prevented many NGOs from developing sustainable structures and practices (Hadiwinata, 2003). Work within an NGO is also often regarded as a stepping stone to something else or as a way of becoming employed in society (Fanany, Fanany & Kenny, 2009: p. 97). Consequently, few employees stay on for long periods in NGOs. Finally, the vast majority of Indonesian NGOs consists of middle class individuals who are university educated and know little about the community or grassroots mobilisation. NGOs thus tend to be micro-oriented and elitist and are not necessarily sensitive to issues at the local level (Hadiwinata, 2003; Fanany, Fanany & Kenny, 2009).

III) MNCs

Finally, to what extent can MNCs, as private actors, develop and strengthen state capacity to regulate labour? MNCs such as *Reebok*, *Gap*, *Nike*, *adidas* and *Levi Strauss* have resided in Indonesia for many years. Many MNCs rely on internal compliance with Codes of Conduct as a way of improving labour standards in their desire to brand their CSR programs (Bartley, 2010). Can MNCs, through compliance with these Codes strengthen and develop state regulatory capacity? Such Codes may, for example, place an obligation on MNCs to enhance the competence of labour inspectors, tribunals and labour ministries to expand state regulation. Codes may also encourage union presence in the workplace so that consequently, pressure is put on the state by unions and their affiliates to improve labour standards. Codes may further inspire a culture of acceptance of regulation in the workplace. Finally, they may be drafted in a way which allows a certain amount of ‘competition’ between MNCs and the state, for example, if Codes provided fair and transparent procedures to resolve worker grievances, guaranteed that workers could participate in decision making on certain issues or implemented advanced labour standards and introduced superior working conditions. This would incentivise the state to review its own policies and procedures on the same issues.

As a type of private regulatory mechanism, however, Codes of Conduct are also subject to various criticisms. For example, Seidman (2003), in discussing the effectiveness of the Sullivan Principles in improving the behaviour of MNCs in South Africa, noted that the monitoring process was problematic because, *inter alia*, firms insisted that the definition of ‘good corporate citizenship’ be guided by their own emphases rather than by substantive concerns. It was not until enormous pressure was generated by activists that firms were persuaded to accept even moderate restrictions on their behaviour. She questioned the viability of the voluntaristic, stateless character of TNC Codes of Conduct in regulating labour standards (p.403). Vogel (2010) shows that while private regulation (specifically, Codes which address labour practices, environmental performance and human rights policies) has resulted in improvements in corporate behaviour, it cannot be regarded as a substitute for the more effective exercise of state authority. He contends that ultimately, private regulation must be integrated with and reinforced by more effective state-based and enforced regulatory policies at both the national and international levels.¹⁰ Similarly, Locke, Kochan, Romis, & Qin (2007) and Locke & Romis (2010) contend that whilst Codes can lead to an improvement in general standards, in themselves, they may not be sufficient. They are but only part of a larger mosaic in efforts to improve working conditions. To be effective, Codes and their monitoring systems also need to be e.g. integrated into management structures, operations, strategy and HRM, operate within an environment in which laws are effectively enforced and be supported by HR systems and unions or other institutions which provide workers with a voice in production and employment. In other research, it was explicitly noted that many MNCs may be eager to monitor labour standards. However, labour violations continued to occur because of structural deficiencies in the monitoring system: flawed factory audit processes,

¹⁰ In another article, the author argues that Codes face the challenge of acquiring legitimacy and of persuading both firms and NGOs of the value of their standards. Such regulation addresses but does not resolve the challenge of making global firms and markets more effectively and democratically governed, Vogel, D. (2009), “Private Global Business Regulation” *Annual Review of Political Science*, 11, 261 – 282

inadequate training of auditors and lack of transparency, all which conspired to produce incomplete information about existing working conditions in supplier factories. A *compliance-focused* approach to the improvement of labour standards is insufficient. In contrast, a *commitment-oriented* approach can lead to sustained improvement in working conditions and labour rights: repeated interactions, joint problem solving and trust building among the key actors (Locke, Amengual & Mangla, 2009). In her research on the implementation of CSR and Codes of Conduct in Indonesia, Kemp (2001) noted the non-involvement of the state in the drafting of Codes. Codes are designed in the head office and rarely in consultation with other labour relations actors. Codes also place MNCs outside of the national regulatory system. The process and outcomes of monitoring are confidential. Perhaps surprisingly, she also pointed out not only that unions and workers were unaware of Codes or their contents, but that many government officials responsible for labour standards had not heard of Codes and even mistook them for collective agreements (p. 12).

More generally, CSR is a new concept for the majority of businesses in Indonesia. For several decades, the country was cut off from international influence and virtually no foreign investment was allowed (Kemp, 2001). Isolated from the influence of international standards, its business culture has been marred by corruption, rent seeking and a lack of CSR activism, all of which have persisted to this day. The country also struggles with high levels of poverty and unemployment. Where vast segments of the population struggle with day to day survival more than anything else, CSR is simply an intangible concept (Kemp, 2001; Koestoer, 2007; Waagstein, 2011). The influence of cultural norms, in particular the acceptance of one's fate, means that poor working conditions are grudgingly accepted by the majority of workers. Many are simply grateful to have any form of income and would happily work harder if it meant more earnings (Kemp, 2001). While many foreign MNCs have introduced labour related CSR policies, many other businesses have failed to do so, due to a lack of understanding of the concept, unstable political environment, corruption and weak law enforcement (Koestoer, 2007).

Recent studies carried out in Asian countries (including Indonesia) on the potential of CSR to improve labour standards shows its downside in two ways (AMRC, 2012). First, it is generally understood as corporate activities to compensate for social and economic injustices. This perspective has led to the belief that it is the obligation of the business community (MNCs) to meet social, economic and environmental requirements, providing a justification for the government to escape its obligations towards society. In other words, it *undermines* rather than *strengthens* state regulatory capacity. Secondly, CSR has been used to manipulate workers to avoid unions in order to safeguard their rights. Research carried out in 4 MNCs in Indonesia revealed that CSR was primarily utilised to build their image. A good public image helps firms gain the trust of society, which in turn legitimises their operations, increases sales, attracts investors and secures greater profits. But there was also a darker side. MNCs discouraged the formation of unions by persuading workers to form a workers' forum instead, through enticing them with many CSR programs. CSR was thus covertly used to weaken unions' influence and to persuade them to be cooperative with management. Where this was not forthcoming, discriminatory action was taken against union leaders and workers (exclusion from training and development opportunities, scholarships and promotion, non payment of wages and allowances). In sum, CSR was a divisive strategy and instead of advancing the interests of workers, was used to promote those of the MNCs themselves.

In an effort to persuade the business community to be more responsive to the needs of society, the Indonesian government enacted the Indonesian Corporation Law No.40/ 2007, and Law No.25/2007 which requires firms in the field of natural resources and capital investment projects to engage with CSR (Tamam, 2006). Non-compliant firms incur sanctions. These laws were regarded as controversial and have become the subject of heated debates, since they contradict the general concept of CSR, which stresses the element of voluntarism. The business community challenged the laws on the basis that they created uncertainty, were unjust and discriminatory

and undermined the voluntary basis of CSR although their action was unsuccessful (Waagstein, 2011: p. 455). However, government regulations which were supposed to be extensions of the Law No.40/2007, were never enacted, causing further confusion in the implementation and monitoring of CSR (AMRC, 2012).

As a private regulatory mechanism to improve labour standards, CSR is both unstable and unreliable. It has been argued that CSR serves the interests of the capitalist classes, and political parties hungry for control over the economic resources generated by the activities of major firms (Rosser & Edwin, 2010). Instead of incentivising the state to improve its regulatory capacity in ways envisaged under the *integrative approach*, it has been used in a self serving manner by MNCs and has sought to reduce, rather than increase, state regulation of labour.

Better Work Indonesia: An *Integrative Approach*?

The discussion of the extent to which key private actors may develop and strengthen state regulatory capacity in the realm of labour in Indonesia has, so far, revealed several factors which discourage this from occurring. A recent important and favourable development in the regulation of labour in Indonesia, however, may bring the goals of the *integrative approach* to fruition.

FOOTNOTE: In his works (2004, 2007, 2010), Kolben discussed the success of Better Factories Cambodia Program in improving labour standards in the country's garment industry. The BFC Program utilises mechanisms typically employed by private regulatory regimes, as opposed to public regulatory systems. It is an example of how private governance systems can help improve public regulation of labour standards. It thus gives effect to the philosophy of the *integrative approach*. He also noted that *Better Work* developed from the BFC Program. Can BW also achieve the goals of the approach?

Kevin Kolben, (2004) "Trade, Monitoring, and the ILO: Working to Improve Conditions in Cambodia's Garment Factories", 7 Yale Human Rights & Development Law Journal, 79, 85–88

Kolben, K. (2007) “Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labour Regimes” *Harvard International Law Journal*, 48, 1, 203 – 256

Kolben, K. (2010) “The WTO Distraction” *Stanford Law and Policy Review*, 21, 3, 461 – 491

~~The Better Work Program (BWP) is a partnership program between the International Labour Organisation and International Finance Corporation to improve compliance with labour standards and promote competitiveness in global supply chains (specifically, in the apparel and garment industries).~~

~~Launched in 2007, it is~~ **Better Work is today** operational in seven countries (Cambodia, Haiti, Jordan, Lesotho, Indonesia, Vietnam and Nicaragua) and has attracted much publicity regarding the role it has played in improving conditions for workers.¹¹ Better Work Indonesia (*BWI*), ~~part of BWP~~, began operations ~~recently~~ in 2011 with the initial geographical focus on the Greater Jakarta Area.¹² Teams have been trained and pilot assessments carried out in a number of factories.¹³ *BWP* adopts an integrated approach to improve labour standards through strengthening cooperation between governments, employers’ and workers’ organisations and international

¹¹ See the *Better Work* website, at < <http://www.ilo.org/washington/areas/better-work/lang--en/index.htm>>

¹² *Better Work Indonesia* can be found at <<http://betterwork.org/indonesia>>

¹³ The challenges for *BWI* are considerable. Evidence collected (42 factories between September 2011 and February 2012, 918 workers) as the *BWI* was starting up in Indonesia revealed several concerns in relation to occupational health and safety, overtime, wages, job security, abuse and sexual harassment. See Huq, A. (2012), “Indonesia Baseline Report: Worker Perspectives from the Factory and Beyond” International Labour Organisation (ILO) and International Finance Corporation (IFC) at < <http://betterwork.com/global/wp-content/uploads/Impact-Research-Indonesia-Baseline-Report-Worker-Perspectives-from-the-Factory-and-Beyond.pdf>>. *BWI*’s own assessments of working conditions in apparel factories in Indonesia (20 factories, 40, 562 workers in the apparel industry in the Greater Jakarta Area) between July 2011 and March 2012 reflect the same concerns. See *BWI*, “Garment Industry 1st Compliance Synthesis Report”, 2012, at < <http://betterwork.com/global/wp-content/uploads/Better-Work-Indonesia-Synthesis-Report-EN.pdf>>

buyers.¹⁴ Its approach is three pronged and is tailored to the needs of the local context (its programs are therefore country specific: such regulation is promoted under the *integrative approach*).¹⁵ First, it helps factories identify areas of non-compliance with international and national labour standards. Secondly, it provides specifically tailored advice to address specific needs of each factory through the establishment of Performance Improvement Consultative Committees (PICC) which consists of both management and union/worker representatives. *BWP* guides the PICC in the development and implementation of an improvement plan, which addresses both non-compliance issues and management systems. Finally, it offers customised training to support workplace cooperation. The training topics range from ILO core labour standards and workers' rights to HRM, supervisory skills and occupational safety and health and a highly participatory approach is encouraged.¹⁶ Participating factories agree to be subject to a monitoring regime in which the *BWP*, using its own Code, inspects their labour standards. It will then create a general database which consolidates compliance and remediation data from each factory, and facilitates sharing that information with international buyers. This in turn allows buyers to reduce their own auditing and redirect resources to fixing problems and on devising sustainable solutions. The benefits *BWP* offers to governments are manifold, and include increased market access, a stronger reputation for safer investment and improved capacity in labour administration.¹⁷ What is noteworthy, **for our purposes**, is that *BWP* reflects elements of the

¹⁴ International buyers such as *Gap* and *adidas* have publicised their involvement in the *BWP*, see for example *Gap Inc. ILO/IFC Better Work Program* at

<http://www.gapinc.com/content/csr/html/Goals/supplychain/our_program_in_action/ilo_ifc_better_workprogram.html> and *adidas Group Better Work* at <<http://www.adidas-group.com/en/ser2010/suppliers/training-our-suppliers/better-work/Default.aspx>>

¹⁵ "...an integrative regulatory approach is case by case and context specific in its effort to describe regulatory dynamics and prescribe regulatory solutions." (Kolben, 2011, p. 433)

¹⁶ More information about *BWP* services (assessment, advisory and training) can be accessed at <http://betterwork.org/global/?page_id=331>

¹⁷ See *BWI* at

<http://www.ilo.org/jakarta/whatwedo/projects/WCMS_180290/lang--en/index.htm>

integrative approach. Private actors (international buyers, employers, trade unions) and the state collaborate with each other with a view to improving labour standards. Implicit within *BWI the Program* however, is also an effort to strengthen state capacity in the regulation of labour.

BWI and the integrative approach

Might *BWI* meet the goals of the *integrative approach*? In addition to improving working conditions and industry competitiveness, is there also scope for developing and strengthening state regulatory capacity in ways envisaged under the *approach*? **IN THE INDONESIAN CONTEXT, AND SPECIFICALLY, IN THE LIGHT OF DIFFICULTIES IN ACHIEVING PRIVATE-STATE ENGAGEMENT IN THE REGULATION OF LABOUR , CAN *BWI* progressively facilitate** a regulatory regime in Indonesia where the state occupies centre stage in the regulation of labour? How can interventions which incentivise cooperation and engagement between the public and private in ways which strengthen the capacity of the former be created? **WHAT CHALLENGES LIE AHEAD?** One overarching question and several more specific ones may be posed which can guide *BWI* strategies to meet the goals of the *integrative approach*. How can *BWI* bring together separate and uncoordinated systems which do not function in ways which boost state capacity into one where constituent parts optimally engage with each other and with the state? More specifically, how can private actors such as international buyers and employers' associations be incentivised to target and improve deficiencies in state regulatory capacity? How can norms and practices flow between Codes and other 'soft' laws, on the one hand, and national laws, on the other, so that they reinforce each other? Can the state, unions, employers and international buyers be incentivised to collaborate together in designing and enforcing laws with the explicit aim of re-emphasising the state? How can international buyers create a culture of acceptance of regulation among their factories? Do they support improvements in their factories? Does regulation by private actors such as NGOs or MNCs give reason for the state, particularly where it is weak, to

avoid its responsibility? Can the comparative advantages of, for example, unions and state labour inspectors be identified and can they complement each other in ways which widen the range of labour violations they could tackle? Can competition be generated between the state and private actors (international buyers or unions) so that the state, for fear of losing its legitimacy, compels its own regulators to improve their enforcement? Finally, how can regulation promote important development goals such as democracy and rule of law in the realm of labour?

Conclusion

The *integrative approach* seeks to recapture the importance of the state in labour regulation in developing countries. Instead of leapfrogging over dysfunctional states, it re-emphasises the state in labour regulation and asks how private regulatory regimes might serve to strengthen public regulatory capacity. If we are persuaded by its promise and value, is there scope for its adoption in Indonesia? A discussion of the labour regulatory regime in Indonesia shows that this is an ambitious task. An analysis of the relationships between the state and three private actors (unions, NGOs, firms) in Indonesia reveal the challenges in incentivising interactions and communications between them in ways which can strengthen state labour regulatory capacity. There is little evidence that the private and public complement each other's actions or build interdependent relationships. The relationships between private actors themselves are also complicated, which reduces the prospects of joint efforts to expand state regulatory capacity. This article has however, also discussed the potential of the recent *BWI* Program in fulfilling the goals of the *integrative approach*. An outline of broad strategies which can expand state regulatory capacity within the parameters of the *BWI* program is offered. Given that appropriate structures are already in place to stimulate collaborations between the public and private within the local context, *BWI* perhaps presents an ideal opportunity to sow the seeds of the approach and for carving out the space in which it might be put into practice. If successful, it would provide a model for further and more ambitious initiatives.

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